MICHAEL LEE FOOK WAH

v.

THE MINISTER OF LABOUR, MALAYSIA & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
TUAN LOW HOP BING J
[ORIGINATING MOTION NO. R3-25-29-94]
7 AUGUST 1995

INDUSTRIAL LAW: *Certiorari and mandumus - Application thereof - Decision of 1st respondent not to refer applicant's claim against dismissal to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967 - Whether 1st respondent acted ultra vires or in excess of jurisdiction - Whether there is a legal requirement that conciliation proceedings must be conducted inter partes - Whether there had been failure by the 1st respondent to investigate and evaluate all the circumstances surrounding the applicant's dismissal from employment by the 2nd respondent - Consideration of the statutory function of the Director-General and the discretion of the Minister under ss. 20(2), 20(3), 26(2) IRA 1967.*

The applicant applied for an order of *certiorari* and *mandumus* to respectively quash the decision of the 1st respondent not to refer his claim against dismissal to the Industrial Court pursuant to s. 20(3) of the Industrial Relations Act 1967 (IRA) and to direct the 1st respondent to exercise his discretion according to law.

The applicant was the appointed general sales manager of Guinness Malaysia Sdn. Bhd. (Guinness) from 1 September 1986 receiving five principal direct reports together with two others i.e. from the sales manager (special projects) and dealer development manager, and he in turn reported to the sales director. At all times the decision making power rested with the sales director and not the general manager (sales) whose position was of an intermediary. In November 1989, there was a merger between Guinness and Malayan Breweries Berhad after which the applicant continued in the same capacity until about 2 years post-merger when the 2nd respondent decided to make the applicant's position redundant in order to increase efficiency and communication and to enable the five said positions to have direct control of their job functions. A compensation package totalling 21 months' salary, an option to purchase the company's car at 20% discount and an additional six months' salary as redundancy payment was offered to the applicant but the same was rejected.

The applicant contended that the 1st respondent's officers had failed to conduct the conciliation proceedings on an *inter parte* basis to enable him to draw out from the 2nd respondent its responses to the applicant's complaint. He further contended that the law expects and contemplates that the 1st respondent would do everything to facilitate and encourage conciliation between

the parties but that he was excluded from the meetings between the 1st respondent and the Director-General of the 1st respondent and the 2nd respondent.

The main issues were whether the 1st respondent had acted *ultra vires* or in excess of jurisdiction and whether the 1st respondent had failed to investigate and evaluate all the facts and circumstances surrounding the applicant's dismissal from employment.

Held:

[1] There is no legal requirement that the conciliation proceedings must be conducted *inter partes*. Be that as it may, from the records in this case, it is clear that the applicant was afforded sufficient opportunity to be heard. He was seen on the same number of occassions as the 2nd respondent's representative and he was given every opportunity to present his case which he did fully. In the circumstances, there is no breach of the 1st limb of the rules of natural justice.

[2] The applicant had discussed the issue of redundancy with the 1st respondent's officers from October 1992 to January 1993 and thereafter. Every issue ventilated by the applicant now has been raised with the 2nd respondent prior to this, as evidenced by the applicant's letter to the 2nd respondent. The applicant has therefore not been prejudiced by the lack of a joint conciliation meeting. The Court is therefore unable to hold that the 1st respondent has acted in a manner which is *ultra vires* or which constitutes an excess of jurisdiction, an abuse of discretion or is otherwise perverse.

[3] The burden is on the applicant to prove the existence of the 1st respondent’s refusal to investigate or evaluate all the facts. The 1st respondent has stated in his affidavit that when coming to a decision not to refer the matter to the Industrial Court, he carefully weighed and considered the representations of the applicant, the report of the Industrial Relations Department containing the efforts at conciliation and the facts raised by the applicant and the 2nd respondent at the conciliation meetings. The applicant on the other hand, was unable to substantiate his allegations.

[4] Section 20(3) of the IRA in effect confers a discretion on the 1st respondent whether or not to make a reference. There is no mandatory requirement in s. 20(3) or anywhere else in the IRA that a reference must be made in any event. Although such discretion does not oust the jurisdiction of the Court to interfere with it, the jurisdiction of this Court is invoked only when the discretion is exercised in an unlawful manner. Therefore it is the manner of exercise of the discretion that is subject to control.

[5] Section 20(2) of the IRA does not impose any duty on the Director-General or his representative to decide or determine questions of any kind and to ascertain the law and the facts. The Director-General or his representative sits in the meeting not as an adjudicator but as a mediator or conciliator. Therefore the applicant cannot complain of the modus utilized by the Director-General or his appointed officer to effect conciliation. In the instant case, the Director-General heard both sides of the story both jointly and separately. The Minister then, having considered the totality of the situation, decided the matter was not fit for reference to the Industrial Court. The decision of the Minister is therefore not irrational and is not null and void. The 1st respondent has not acted in excess of and/or without jurisdiction.

[Applicant's claim dismissed with costs].

Cases referred to:

Minister of Labour Malaysia v. Chan Meng Yuen & Anor. [1992] 4 CLJ 1808, [1992] 2 MLJ 337 ***(refd)***

Minister of Labour Malaysia v. Sanjiv Oberoi & Anor. [1990] 1 CLJ 44, [1990] 1 MLJ 113 ***(refd)***

Rex v. Northumberland Compensation Appeal Tribunal Ex parte Shaw [1952] 1 KKB 338 ***(refd)***

National Union of Hotel Bar & Restaurant Workers v. Minister of Labour [1980] 2 MLJ 189 ***(refd)***

Minister of Labour and Manpower & Anor. v. Wix Corporation Southeast Asia Sdn. Bhd. [1980] MLJ 248 ***(foll)***

Legislation referred to:

Industrial Relations Act 1967, s. 20, (2), (3)

For the appellant - Mazlinda; M/s. Ng Yook Woon, Andrew T.C. Saw & Company
For the 2nd respondent - N. Pathmanathan; M/s. Skrine & Co.

JUDGMENT

Low Hop Bing J:

I Application

This is an application praying for:

(a) An order of *certiorari* to quash the first respondent's (R1's) decision not to refer the matter to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967 (IRA); and

(b) An order of *mandamus* that R1 be directed to exercise his discretion according to the law.

The applicant has set out two grounds as follows:

(1) R1 had acted *ultra vires* and/or in excess of and/or without jurisdiction and/or abused his discretion in exercising his statutory discretion by not referring the applicant's matter to the Industrial Court.

(2) R1 had refused or otherwise failed to investigate and evaluate all the facts and circumstances surrounding the applicant's dismissal from employment by the second respondent (R2).

In this application, the burden is on the applicant to establish the aforesaid grounds.

II Facts of the Case

The applicant was originally appointed the general sales manager of Guinness Malaysia Sdn. Bhd. on 1 September 1986.

In or around November 1989, there was a merger between Guinness Malaysia Sdn. Bhd. and Malayan Breweries Berhad. The applicant continued in his employment in the capacity of general manager (sales) in R2. The applicant's redundancy arose as his position as general manager (sales) was disestablished to improve the efficiency of managing the business.

The applicant as general manager (sales) of R2 received five principal direct reports, *viz* from:

(a) National sales manager ('NSM') (PM-North)

(b) NSM (PM-South)

(c) Borneo Manager

(d) NSM (Draft Outlets)

(e) NSM (National Accounts & Duty Free)

These were all senior management positions whose term with R2, and before the merger with Guinness and Malayan Brewery, exceeded that of the applicant. The line of reporting was that the above 5 positions together with 2 others, namely the sales manager (special projects) and dealer development manager, reported to the general manager (sales) who in turn reported to the sales director. The merger took place in November 1989. R2 contends that, post-merger, it became progressively clearer to the management that the 5 positions referred to could function efficiently and independently without having to report to an intermediate position below that of the sales director. The purpose of having 5 direct reports was to achieve sales targets, manage the sales budget, develop sales growth and assess establishment strength. However, the decision making power or capacity rested then, as it does now, with the

sales director and not the general manager (sales) who was the applicant. The position of the general manager (sales) was therefore somewhat of an intermediary, a further channel stop that the 5 national managers had to go through, prior to obtaining a decision. Therefore in order to achieve greater efficacy and communication and to enable the 5 positions to have direct control of their job functions, R2 came to the conclusion, 2 years post-merger, that the applicant's position was redundant. Further, it was not feasible to maintain that position simply to accommodate the other 2 positions of sales manager (special projects) and dealer development manager. As the applicant's position was made redundant, a compensation was offered to the applicant and that compensation totalled RM214,167 or 21 months' salary in addition to the purchase of the company's motor vehicle at 20% of discounted price, where the estimated market value was RM88,000. This package was profferred to the applicant for his six years and 5 months term of service. R2 had indicated that it was prepared to offer the applicant an additional six months salary as redundancy payment, but even this was rejected by the applicant.

III Determination of Issues by the Court

(1) Has R1 acted ultra vires/in excess of Jurisdiction?

The applicant contended that R1's officers had failed to conduct the conciliation proceedings on an *inter parte* basis. The contention brings into the question as to whether there is a legal requirement that the conciliation proceedings must be conducted *inter partes*. In my view, there is no legal requirement that conciliation proceedings must be held *inter partes*. Be that as it may, from the records in this case, it is clear to me that the applicant was afforded sufficient opportunity to be heard. He was seen on the same number of occasions as R2's representative. He was given every opportunity to present his case which he did fully. In the circumstances, there is no breach of the first limb of the rules of natural justice. The applicant however has not alleged bias.

The applicant claimed that he was deprived of a joint conciliation meeting to enable him to draw out of R2 its responses to the applicant's complaint. In any event, the applicant had discussed the issue of redundancy with R1's officers from October 1992 to January 1993 and thereafter. Indeed, every issue ventilated by the applicant now has been raised with R2 prior to this, as evidenced by the applicant's letter to R2. The applicant has therefore not been prejudiced by a lack of a joint conciliation meeting. I am therefore unable to hold that R1 has acted in a manner which is *ultra vires* or which constitutes an excess of jurisdiction, an abuse of discretion or is otherwise perverse.

(2) Has R1 refused or otherwise failed to investigate and evaluate all the facts and circumstances surrounding the applicant's dismissal from employment by R2?

Here, again, the burden is on the applicant to prove the existence of R1's refusal to investigate or evaluate all the facts. In other words, the applicant has to show that R1's decision was perverse or that the facts point overwhelmingly to a different decision.

R1 has stated in paras. 4 and 5 of his affidavit that when coming to a decision not to refer the matter to the Industrial Court, he has carefully weighed and considered the representations of the applicant, the report of the Industrial Relations Department containing the efforts at conciliation and the facts raised by the applicant and R2 at the conciliation meetings. The applicant, on the other hand, was unable to substantiate his allegations.

R1's function under s. 20(3) is not that of a rubber-stamp. It is certainly not the rubber-stamping function of R1 to refer every dispute to the Industrial Court. Section 20(3) provides:

> ... the Minister may, if he thinks fit, refer the representation to the Court for an award.

Section 20(3) in effect confers a discretion on R1 whether or not to make the reference. There is no mandatory requirement in s. 20(3) or anywhere else in IRA that a reference must be made in any event. Whether or not a reference is to be made by the Minister pursuant to s. 20(3) depends on the particular facts of each case. There can be no general statement of formula of universal application. Although such discretion does not oust the jurisdiction of the Court to interfere with it, the jurisdiction of this Court is invoked only when the discretion is exercised in an unlawful manner. Therefore it is the manner of exercise of the discretion that is subject to control. R1 may exercise his discretion after taking into account all relevant factors including not only the applicant's representations but also R2's representations.

In *Minister of Labour Malaysia v. Chan Meng Yuen & Anor.* [1992] 2 MLJ 337 the Supreme Court held that the Minister is not bound to give reason for his decision on the basis of *Minister of Labour Malaysia v. Sanjiv Oberoi & Anor.* [1990] 1 MLJ 113:

> The Minister of Labour is not required to give any reasons when he exercises his discretion under s. 20(3) of the Industrial Relations Act 1967.

It also held that the Courts cannot compel the Minister to give reasons for his decision when there is no duty to do so. (*Sanjiv Oberoi* case *supra*; *Rex v. Northumberland Compensation Appeal Tribunal Ex parte Shaw* [1952] 1 KKB 338).

In *National Union of Hotel Bar & Restaurant Workers v. Minister of Labour* [1980] 2 MLJ 189, it was the contention of the union that the Minister, in refusing to refer a dispute to the Industrial Court, had failed to take into consideration a similar case which was referred to the Industrial Court. In so failing, it was contended, the Minister had exercised his discretion "...wrongfully and in a manner not in accord with the policy and object of the Industrial Relations Act 1967...". Raja Azlan Shah CJ (now HRH the Sultan of Perak) (in delivering the judgment of the then Federal Court) stated:

> ... Section 26(2) of the Industrial Relations Act 1967 ... where the Minister is "satisfied" that it is expedient to do so, he may of his own motion refer any trade dispute to the Industrial Court. This subjective formulation is sufficient in our opinion to show that the Minister has a discretion to determine the desirability or otherwise of a particular course of action within the scope of the discretionary power. It is the exercise by him of that discretion vested in him, not in the Courts, that we are required to review, and when his action is challenged in the Courts for alleged abuse of discretion, we are obliged to resist any temptation to convert our jurisdiction to review into a reconsideration of the merits as if on appeal ...

Thus in my judgment the Industrial Relations Act 1967, must be so construed as to determine its policy and object. Briefly it provides a machinery for investigating, determining and settling such disputes by arbitration, conciliation and reference to the Industrial Court, and in implementing it, policy decisions come into play. The Courts call this 'discretion', meaning that the decision is one for the Minister to make and not for the Courts. It is a matter of discretion depending upon the satisfaction of the Minister with respect to the expediency of making such a reference. But if the Minister, by reason of his having misconstrued the Act or for some other reason, so exercises his discretion in a way as to defeat the policy and object of the Act, then he has clearly exercised it wrongly. In that case, the Courts will interfere, but not otherwise. The duty of the Court is to exercise a supervisory, not an appellate, jurisdiction with a view to ascertaining whether R1 had acted unlawfully or exercised his discretion in such a way as to defeat the policy and object of the IRA more particularly on the aforesaid grounds.

The applicant further submits that the law expects and contemplates that R1 will do everything to facilitate and encourage conciliation between the parties, so that the applicant will be encouraged to see his opponent's viewpoints and can bargain with him for an amicable settlement. The applicant, it was contended, was excluded from the meetings between R1's Director-General and R2.

This submission, in my view, calls into question the statutory function of the Director-General under s. 20.

(2) In *Minister of Labour and Manpower & Anor. v. Wix Corporation Southeast Asia Sdn. Bhd.* [1980] MLJ 248 at 250, it was held, *inter alia,* that:

> ... By s. 20(2) of the Act the Director-General has a wide discretion in the choice of steps he may take to get the employee and the employer to settle the dispute. He may speak to the parties personally or write to them to ascertain their position or ask them to attend a meeting before him so that he can guide them to settlement. He may appoint another officer to act on his behalf. He or his representative may refuse to deal with the agents of the employer or employee, whether they be lawyers or otherwise ...;

and subsequently (RHC at B, p. 250):

> ... Section 20(2) of the Act plainly does not impose any duty on the Director-General or his representative to decide or determine questions of any kind and to ascertain the law and the facts. He is merely required to deal with the situation in the way he thinks best to get the employer and employee to settle the dispute. If he is satisfied that there is no likelihood of settlement within a month, he is to notify the Minister. Any meeting covered is merely intended to be for the purpose of bargaining between the employer and the employee so that one can see the other's viewpoint and settle the dispute themselves. It is not a forum for discussing rights and law. The Director-General or his representative sits in the meeting not as an adjudicator but as a mediator, or ... conciliator ... whether or not a settlement is reached is a situation brought about by the parties and not by his assessment of the facts ... In notifying the Minister, s. 20(2) of the Act does not appear to require him to do so in the form of a report on the circumstances leading to there being no settlement. ...

Pursuant to the principle enunciated in the *Wix* case above, I am of the view that the applicant cannot complain of the modus utilized by the Director-General or his appointed officer, to effect conciliation. In an effort to achieve conciliation in the instant case, the Director-General conducted four meetings with the applicant and three with R2.

In the instant case, the Director-General heard both sides of the story both jointly and separately. The Minister then, having considered the totality of the situation, decided the matter was not fit for reference to the Industrial Court. The decision of the Minister is therefore not irrational and therefore is not null and void. R1 has not acted in excess of and/or without jurisdiction. Therefore the applicant's claim is dismissed with costs.